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DFAE SUPPL

STATE OF MICHIGAN
IN THE SUPREME COURT

LATIF Z. ORAM, a/k/a RANDY Z. ORAM, et al.,
Plaintiff/Appellant,

v.

JOHN ORAM and GARY ORAM,
jointly and severally,
Defendants/Appellees,

AND

JOHN ORAM and GARY ORAM, et al.,
Counter-Plaintiffs /Appellees,

v.

LATIF Z. ORAM, a/k/a RANDY Z. ORAM, et al.,
Counter-Defendants/ Third-Party Defendants/Appellant.

S.Ct. No. 134670

COA Docket No. 267077
LC Case: 02-039499-CK

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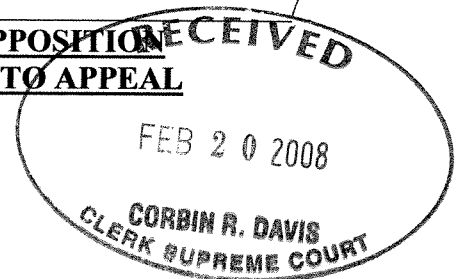
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GARY ORAM'S SUPPLEMENTAL BRIEF IN OPPOSITION
TO LATIF ORAM'S APPLICATION FOR LEAVE TO APPEAL

Hearing: March 5, 2008



BACKGROUND

This case went to the Court of Appeals after five (5) years of proceedings in the trial court. Applicant Latif Oram, dissatisfied with the Court of Appeals' judgment, now seeks leave to appeal. The application is protractive in intent and purpose, and does not even meet or satisfy the requirements of MCR 7.302(B) for leave to appeal.

1. The issues presented by Applicant do not involve any substantial questions as to the validity of a legislative act.
2. The issues are neither a matter of significant public interest nor a case by or against the State or its officers, agencies or subdivision.
3. The issues do not involve legal principles of major significance to the State's jurisprudence.
4. Whereas Applicant seeks to appeal from the Court of Appeals' decision, he fails to show that the decision was clearly erroneous and will cause material injustice, or that the said decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

Plaintiff-Applicant consistently flouted the trial court's orders

As the Court of Appeals unanimously noted, **“plaintiff (applicant) had already shown a pattern of failing to comply with court orders ... and by continuing to seek vexing and increasingly cumulative discovery.”** COA Opinion and Decision, entered May 22, 2007, at p. 12. In this case, for example, discovery closed on September 13, 2005 pursuant to the scheduling order. See, Transcript of Hearing, 08/31/2005, pp.16-19, and **Exhibit 1-B** (Order, *Hon. Wendy L. Potts, Order, entered 10/11/05*).¹ Yet, Plaintiff in

¹ References are to Exhibits filed with this Respondent's Brief.

defiance of court order continued to schedule and conduct depositions, with extensive demands for production of documents from parties and non-parties.

On September 21, 2005 Plaintiff filed his Motion for Leave to Amend Complaint and for Adjournment of Trial. Plaintiff's motion demanded that "**trial in this case must be deferred a minimum of six months.**" See, **Exhibit 1-A** (*Plaintiff's Motion for Leave to File a First Amended Complaint and for Adjournment of Trial*). At the time, the case had been on the docket for over three (3) years. The trial, in ruling on the motion, ordered that "[t]here shall be no further discovery in this matter." **Exhibit 1-B** (*Trial Court Docket, p. 093, Order of October 06, 2005*). In disregard of the order, Plaintiff continued to conduct discovery. Plaintiff, in his litigious habit, had no intention to proceed to trial.

Plaintiff failed to comply with pretrial orders and trial instructions.

The court issued its final trial instructions on September 27, 2005. **Exhibit 2**. By November 14, 2005, trial date, Plaintiff had not prepared or submitted his case theory as ordered. Plaintiff also had not proposed any jury instructions, and did submit a verdict form, as ordered. Interestingly, rather than prepare for and proceed to trial, Plaintiff, without leave, had commenced a new suit in Federal District Court on November 8, 2005 against the Oram Receiver, Harry Cendrowski. **Exhibit 9** (*Latif Oram's Complaint, Eastern District of Michigan, Case No. 2:05CV74287*).

Plaintiff ultimately refused to appear or proceed with jury selection and trial

On November 14, 2005 when, as scheduled, the parties appeared for Jury Selection, Plaintiff refused to proceed.² The court then adjourned proceedings to the next

² Note, however, that on the said November 14, 2005, Mr. Shaw, Plaintiff's counsel, did appear in U.S. District Court in Detroit, in Plaintiff's new action against the Oram Receiver. **Exhibit 3-A**, (*Hearing transcript, 11/15/2005, p. 4*). Mr. Shaw after all was not

day, November 15, 2005. On November 15, 2005 Plaintiff again refused to proceed. Joseph Bird, Esq., Plaintiff's other counsel, was present in court, but refused to proceed in Plaintiff's behalf.³ **Exhibit 3-A** (*Transcript of Hearing, 11/15/05, p. 5, lines 7-8*). Plaintiff's reason for not proceeding with trial was that "James Shaw is undergoing an evaluation at Huron Valley Hospital regarding an abnormal artery in the neck." **Exhibit 3-B** (*handwritten note from one Dr Kevin Lee*). There was no proof of hospitalization.

At the session of court on November 15, 2005, following Mr. Shaw's absence and sudden claim of illness, the trial court demanded substantiation of counsel's illness. **Exhibit 3-A** (*Transcript of Trial Court Hearing, 11/15/05, p. 3, lines 7-22*). The Court once again adjourned proceedings and ordered as follows:

[I]t is hereby ordered that the parties and their counsel appear for trial on Thursday, November 17, 2005 at 8:30 a.m. ... It is further ordered that if Plaintiff's counsel fails to appear on Thursday, November 17, 2005 at 8:30 a.m. as a result of claimed incapacity, Plaintiff's counsel shall present his physician to testify regarding his incapacity on November 17, 2005 at 8:30 a.m. **that physician may be examined by the parties and the Court as to James Shaw's purported incapacity as stated in the attached letter of Kevin Lee, M.D. If Plaintiff's purported incapacity is not supported by testimony of his physician, and Plaintiff is unwilling to proceed to trial, this matter will be dismissed, with prejudice.**

See, Exhibit 4 (Order, November 15, 2005) (emphasis shown).

On 11/17/2005 Plaintiff refused to proceed to trial or comply with Order.

Plaintiff and his counsel failed to present Dr Kevin Lee on November 17, 2005. There is no record that Dr Lee ever contacted the court on or before November 17, 2005. As the court attempted to verify the circumstances of counsel's claimed incapacity, counsel abrasively demanded that he speak "*without interruption.*" **Exhibit 5** (*Hearing*

before Hon. Murphy (Wayne County) on November 14, 2005 as he earlier had claimed he would in his *Motion for Adjournment of Trial Date*, filed in September 2005. See, Exhibit 1-A, ¶ 18.

³ Mr. Bird and Mr. Shaw, both Plaintiff-Applicant's attorneys practiced in and from the same office in Southfield, Michigan at the material times now in issue.

Transcript, November 17, 2005, p. 6, line 16-18). Plaintiff's counsel, informally dressed, refused to proceed with the set trial. The parties and the Court thus could not examine Dr Lee as ordered. The court did not find that Mr. Shaw was physically or mentally unable to proceed. Plaintiff evidently never intended to proceed to trial as scheduled. The trial court, pursuant to its standing order, dismissed the case. **Exhibit 6** (*Order of Dismissal*).

One week later, on or about November 23, 2005, Plaintiff brought a Motion to Set Aside the Dismissal under MCR 2.603(D)(3). See, Docket, 11/23/03. The trial court treated the motion to set aside as one for reconsideration under MCR 2.119(F)(1)(2). On November 28, 2005 the court denied Plaintiff's motion to set aside. **Exhibit 7** (*Order Denying Motion to Set Aside / Motion for Reconsideration*).

Case Evaluation Sanctions.

On April 21, 2004 Plaintiff had rejected a unanimous case evaluation award. **Exhibit 8** (*Notice of Rejection of Case Evaluation*). Based on Plaintiff's rejection of case evaluation, and the Court's subsequent final order denying Plaintiff's Motion to Set Aside, Defendant Gary Oram timely moved for case evaluation sanctions.

ANALYSIS

I. THE TRIAL COURT PROPERLY DISMISSED THE CASE WITH PREJUDICE, AND APPLICANT CANNOT DEMONSTRATE ANY ABUSE OF DISCRETION

For an application to merit the Supreme Court's review, the appellant-applicant must show that Court of Appeals' decision was clearly erroneous and would result in material injustice. MCR 7.302(B)(5). *Bean v Directions Unlimited, Inc.*, 462 Mich 24; 609 NW2d 567 (2000). Except only on a finding of **clear abuse of discretion**, the appellate court may not disturb the trial court's exercise of its power. *Maldonado v. Ford Motor Co.*, 476 Mich 372, 719 NW2d 809 (2006). The application falls short of standard.

Standard of Review

The appellate court reviews the trial court's decision to dismiss for a clear abuse of discretion. *Vicencio v. Jaime Ramirez, MD, PC*, 211 Mich. App. 501, 536 NW2d 280 (1995). Generally, the decision whether to dismiss a case with or without prejudice is within the trial court's discretion. *Rinke v. Automotive Moulding Co*, 226 Mich. App. 432; 573 NW2d 344 (1997), lv den 459 Mich 900; 589 NW2d 280 (1998).

“An abuse of discretion occurs when the court's decision results in an outcome falling outside the principled range of outcomes.” *Woodward v. Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). This standard acknowledges that there are circumstances in which there is no single correct result. *Maldonado v. Ford Motor Co.*, 476 Mich 372, 719 NW2d 809 (2006). When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment.” *Id.* (emphasis).

II. THE SUPREME COURT ESTABLISHES RULES AND PROCEDURES FOR ORDERLY ADMINISTRATION OF JUSTICE, AND IS COGNIZANT OF THE TRIAL COURT'S INHERENT AUTHORITY TO IMPOSE DETERRENT SANCTIONS AGAINST NONCOMPLIANT LITIGANTS AND COUNSEL

The Supreme Court establishes the practice and procedure in and for all courts. *Lapeer County Clerk v Lapeer Circuit Court In re Lapeer County Clerk*, 469 Mich 146; 665 NW2d 452 (2003). All lower courts follow this Court's precedents and authority.

[W]e affirm the authority of trial courts to impose sanctions appropriate to contain and prevent abuses so as to ensure an orderly operation of justice.

We reiterate that trial courts possess the inherent authority to sanction litigants and their counsel, including the power to dismiss an action ... This power is not governed so much by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve orderly and expeditious disposition of cases.

Maldonado v Ford Motor Co., 476 Mich 372, 719 NW2d 809 (2006) (emphasis).

Michigan jurisprudence favors certainty and stability in the law, including its practice and procedures. A court has inherent authority to sanction litigants and counsel, including the imposition of a dismissal with prejudice, when a party or the party's counsel fails to comply with court rules or orders, or fails to appear for trial. See, *Maldonado*, 476 Mich 372, (2006); *Persichini v. Beaumont Hospital*, 238 Mich. App. 626, 639-640, 607 NW2d 100 (1999); *Prince v. MacDonald*, 237 Mich. App. 186, 189, 602 NW2d 834 (1999); *Brenner v Kolk*, 226 Mich. App. 149, 160; 573 NW2d 65 (1997); *Zerillo v. Dyksterhouse*, 191 Mich. App. 228, 477 NW2d 117 (1991). The courts also have statutory authority to direct and control their proceedings, and effectuate their jurisdiction and judgment. MCL 600.611. Dismissal with prejudice is within this range.

The principle in *Maldonado* has guided the lower courts, now incorporated in the (Updated) Michigan Circuit Court Benchbook, Chapter 3 (Civil Proceedings), §1.9 and §3.22 (E). In *Woods v SLB Property Management, LLC* (COA# 272257), released January 22, 2008, the court dismissed plaintiff's action for plaintiff's failure to file a timely amended complaint as ordered. See also, *Schell v Baker Furniture Co.*, 232 Mich App 470; 591 NW2d 349 (1998), aff'd 461 Mich 502; 607 NW2d 358 (2000) (dismissal for plaintiff's failure to participate in pretrial proceedings); *Makowski v Towles*, 195 Mich App 106; 489 NW2d 133 (1992) (dismissal for plaintiff's failure to appear for a scheduled pretrial conference). The court also properly dismissed the plaintiff's second suit when plaintiff again failed to appear for a scheduled pretrial conference); *Zantop International Airlines, Inc v Eastern Airlines*, 200 Mich App 344; 503 NW2d 915 (1993) (dismissal for violation of pretrial orders and as a deterrence to party and any others).

The trial court has a gate-keeping obligation to impose deterrent sanctions. The court's gate-keeping function includes the power to dismiss with prejudice when a party or party's counsel fails to appear for trial. *Zerillo v. Dyksterhouse*, 191 Mich. App. 228, 477 NW2d 117 (1991). In the instant case, there was record history before the Circuit Court and the Court of Appeals of Plaintiff's past and continuing disregard of standing orders, in mockery of the administration of justice and to Defendants' prejudice.⁴

Latif Oram had full and emphatic notice(s) of a scheduled trial, but chose to disregard or circumvent the schedule.⁵ At a point in this case's history, the case stood distinct as the oldest case on the docket. The trial court gave Plaintiff sufficient warnings and a fair opportunity for compliance prior to the dismissal. Dismissal with prejudice was a principled outcome. Any sanctions less than dismissal would have been useless.

“[O]n the specific facts of this case, we cannot say that the trial court surpassed the range of principled outcomes in dismissing plaintiff's claims ... We perceive no abuse of discretion,” the Court of Appeals concluded. *COA Opinion*, p. 13.

⁴ Plaintiff's insistence on a 6-month adjournment of trial was prejudicial to Defendants (**Exhibit 1-A**). Note also, Plaintiff's "tactical" disregard of Court's orders was deliberate, eg. conducting discovery even after the Court ruled that discovery had closed (**Exhibit 1-B**); refusal to close on certain real property for almost one year in violation of Order Extending Discovery (**Exhibit 17**); disregard of trial-readiness instructions of September 27, 2005 (**Exhibits 1, 2, 4, and 17**); disregard of Order of November 15, 2005 (**Exhibit 4**); James Shaw's failure to substantiate his claimed illness and willful failure to produce Dr Lee for examination on oath, etc.

⁵ *Vicencio v. Ramirez*, 536 NW2d 280, 284 (1995) supports dismissal because Latif Oram's habitual disregard of court orders (1) was willful, (2) Latif Oram had a history of noncompliance with court orders, (3) Defendants Gary Oram and John Oram were prejudiced by and entrapped in Latif Oram's dilatory mischief, (4) Latif Oram had a history of working deliberate delays, (5) Latif Oram refused to cure delays and defects in spite of court orders and warnings, and (6) any sanction short of dismissal would have served no useful purpose. The list is not exhausted. *Dean v. Tucker*, 182 Mich App 27; 451 NW2d 571, 575 (1990).

III. DISMISSAL OF LATIF ORAM'S ACTION WITH PREJUDICE WAS WITHIN THE DEFINITION OF A VERDICT UNDER MCR 2.403(O)(2)

For purposes of case evaluation sanctions, “**verdict**” includes a judgment entered as a result of a ruling on a motion after rejection of the case evaluation. MCR 2.403(O)(2)(c). *Marketos v. American Employers Insurance Co.*, 465 Mich 407, 633 NW2d 371 (2001).

The order of dismissal with prejudice falls within the definition of “**verdict**” under MCR 2.403(O)(2)(c) ... To find otherwise would be contrary to the purpose behind MCR 2.403, which is to encourage settlement and deter protracted litigation costs upon the party that required that the case proceed toward trial by rejecting the mediator’s evaluation. *Broadway Coney Island, Inc. v. Commercial Union Insurance Co.*, 217 Mich App 109, 114; 550 NW2d 838 (1996), citing *Michigan Basic Property Ins. Association v. Hackert Furniture Distributing Co., Inc.*, 194 Mich. App. 230, 234; 456 NW2d 68 (1992).

On April 21, 2004 Plaintiff rejected a unanimous case evaluation award, which Defendants unconditionally accepted. **Exhibit 8** (Notice of Rejection).⁶ On November 17, 2005 the trial court dismissed Plaintiff’s action with prejudice. On November 23, 2005 Plaintiff brought a Motion to Set Aside the Order of Dismissal under MCR 2.603(D)(3). Docket, 11/23/03. The trial court treated Plaintiff’s motion as a Motion for Reconsideration under MCR 2.119(F)(1)(2). The court denied Plaintiff’s motion on November 28, 2005, this being the dispositive order as to all claims between all parties, **Exhibit 7** (*Order Denying Motion to Set Aside*), triggering MCR 2. 403(O)(8) request.⁷

Based on Plaintiff’s rejection of the case evaluation award, and the order denying Plaintiff’s motion to set aside, Gary Oram timely moved for sanctions. If a party has

⁶ A prevailing party is one whose position has been improved by the litigation. MCR 2.625(A)(1). *Citizens Insurance Co v. Juno Lighting, Inc.*, 247 Mich App 236, 635 NW2d 379 (2001). The prevailing party is entitled to actual costs. MCR 2.403(O)(6). *Haliw v Sterling Heights*, 471 Mich 700, 691 NW2d 753 (2005).

⁷ *See, Allied Electrical Supply Co. v. Tenaglia*, 461 Mich 285, 602 NW2d 572 (1999); *Williams v. Arbor Home, Inc.*, 254 Mich. App. 439, 656 NW2d 873 (2002).

rejected a mediation evaluation and the action proceeds to verdict, the rejecting party must pay the other party's actual costs, unless the verdict is more favorable to the rejecting party than the mediation evaluation. MCR 2.403(O)(1). *HA Smith Lumber & Hardware Co v Decina*, 258 Mich App 419; 670 NW2d 729 (2003).

The verdict was more favorable to Defendant than to Plaintiff. MCR 2.403(O)(4). The trial court thus did not abuse its discretion by imposing sanctions. MCR 2.403(O). *Haliw v City of Sterling Heights*, 471 Mich 700, (2005); *Attard v. Citizens Insr. Co. of America*, 237 Mich App 311, 602 NW2d 633 (1999); *Badiee v. Brighton Area Schools*, 265 Mich App 343, 695 NW2d 521 (2005). Plaintiff, however, relying on *Jerico Construction Co., Inc. v. Quadrants Inc.*, 257 Mich. App. 22, 666 NW2d 310 (2003), contends that the trial court and Court of Appeals misapplied MCR 2.403(O)(2) and erroneously deemed the dismissal with prejudice to be a 'verdict' for case evaluation purposes. Applicant's Br. pp. 23-24. Plaintiff clearly misreads "ruling on a motion," as used in *Jericho* and in MCR 2.403(O)(2). Whereas dismissal in *Jerico* resulted from a voluntary settlement (mutual agreement or stipulation), dismissal in the Oram case was not voluntary. *Broadway Coney Island v. Commercial Union Insr. Co.*, 217 Mich App 109, 114; 550 NW2d 838 (1996). A trial court has inherent authority, and will exercise it.

Plaintiff's application lacks merit, and does not meet the requirements of MCR 7.302(B) for leave to appeal. Gary Oram prays that the application be denied.

Dated February 20, 2008

Respectfully submitted,



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